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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 71-113

ROMAN STANISLAW RYBA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Third Circuit.

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Cleveland, Ohio 44113,
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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

ROMAN STANISLAW RYBA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Third Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 25, 1971.

CITATIONS TO OPINION BELOW.

The case in the United States District Court for the District of New Jersey is unreported. The Journal Entry of said court is set forth in the Appendix on page 15.

The opinion as of this date of the Court of Appeals for the Third Circuit is not reported. The opinion and the judgment of the Court of Appeals for the Third Circuit are set forth in the Appendix on page 9 and page 13.

Petitioner filed in the Court of Appeals for the Third Circuit a Motion for leave to file petition for rehearing out of time and Petition for Rehearing. On June 25, 1971, the Court of Appeals for the Third Circuit granted the

motion for leave to file petition for rehearing out of time, and denied the petition for rehearing. The order of the court is set forth in the appendix on page 14.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254.

The Circuit Court of Appeals Order sought to be reviewed was filed April 23, 1971. Petitioner filed a Petition for Rehearing which Petition for Rehearing was denied on June 25, 1971.

QUESTION PRESENTED.

The question thus presented is:

Was there a violation of due process of law as guaranteed by the Fifth Amendment to the United States Constitution where petitioner, a draft registrant, an alien, citizen of Poland, emigrated to Canada on July 17, 1968, returned to the United States of America on December 12, 1968, and his draft board refused to re-open his draft case, but instead issued on December 13, 1968 to petitioner an induction notice to report for induction on December 13, 1968 into the military service of the armed forces of the United States of America?

The Court below apparently answered this question, "NO."

Petitioner contends that this question should be answered "YES."

Present counsel for petitioner first raised this constitutional question in his Petition for Rehearing.

CONSTITUTION, STATUTE AND REGULATIONS INVOLVED.

FIFTH AMENDMENT, UNITED STATES CONSTITUTION.

No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

TITLE 50 U.S.C. APPENDIX.

Section 462. Offenses and penalties.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections] . . . shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

CODE OF FEDERAL REGULATIONS.

32 CFR § 1622.42. Class IV-C: Aliens.

* * * * *

(c) In Class IV-C shall be placed any registrant who is an alien and who has departed from the United States. Such alien shall be placed in Class IV-C even though he is a delinquent but this classification shall in no way relieve him from liability for prosecution for violation of the selective service law. If any registrant so classified under this paragraph returns to the United States, his classification shall be reopened and he shall be classified anew.

32 CFR § 1625.1. Classification not permanent.

(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrant.

32 CFR § 1625.3. When registrant's classification shall be reopened and considered anew.

(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), which may have been issued to the registrant.

STATEMENT OF FACTS

Petitioner, a native and citizen of Poland, made application to emigrate to Canada in December, 1967. In July, 1968 appellant was informed by Canadian authorities, that due to the strike of Canadian postal employees, that appellant's visa to emigrate to Canada was delayed. Canadian authorities advised petitioner that he now had authorization and permission to move to Canada, therefore, appellant emigrated to Canada on July 17, 1968.

Since July 17, 1968, petitioner, a citizen of Poland, was legally living in Canada. On December 12, 1968, petitioner visited his father and family in Cedar Grove, New Jersey. December 13, 1968, petitioner received an induction notice to report for military service on December 13, 1968, refused to report, and was arrested on December 13, 1968.

While petitioner was complying with Canadian regulations and laws, petitioner received an induction notice in February, 1968. Petitioner sought a postponement of said induction notice, and his local draft board gave him a six (6) months extension of time for induction. The request for postponement was based on the death of petitioner's mother in Poland, and appellant's efforts to settle his mother's estate in Poland.

Petitioner in September, 1968 received a second induction notice which was mailed to his previous address and residence in Cedar Grove, New Jersey. Petitioner's father communicated with appellant in Canada the information that appellant was to report for induction.

On February 27, 1970, petitioner was sentenced by the United States District Court for the District of New Jersey to a Four (4) year term of imprisonment for violating Title 50 U.S.C. Appendix Section 462.

The Third Circuit Court of Appeals rendered its opinion and judgment on April 23, 1971 affirming the trial court's judgment and sentence.

On June 1st, 1971, petitioner's new counsel and present attorney submitted to the Third Circuit Court of Appeals a Motion for leave to file Petition for Rehearing out of time.

On June 25, 1971, the Third Circuit Court of Appeals granted said Motion but denied the Petition for Rehearing.

Appellant changed his attorney approximately on May 23, 1971.

REASONS FOR GRANTING THE WRIT.

There are Four (4) grounds for granting the writ of certiorari. They are as follows:

1. A young male person subject to the draft law commits no crime by emigrating, and an alien who departs from the United States is to be classified IV-C even though he may have been delinquent at the time of his departure. 32 CFR 1622.42 (c).

2. If said alien registrant returns to the United States his classification must be reopened and must be classified anew. 32 CFR 1622.42 (c).

3. The induction notice under which appellant was convicted is invalid since said notice of induction violates 32 CFR 1625.3 (a).

4. The trial court had no jurisdiction to try petitioner as a draft evader since appellant was not subject to induction into the military service at the time petitioner received his induction notice to report. Since the trial Court had no jurisdiction at the time of trial, the conviction and sentencing of appellant was a denial of due process of law in violation of the Fifth Amendment of the Constitution of the United States.

The Court must always consider the question of jurisdiction.

A wrongful refusal to re-open is in conflict with *Mulloy v. United States* (1970), 398 U.S. 410. The refusal to re-open is a blatant lawless act. *United States v. Broyles,* 423 F.2d 1299 (4th CCA 1970); *United States v. Haughton,* 413 F.2d 736 (9th CCA 1969).

The regulations of the Selective Service System have the full force of law. *Singer v. United States* (1945), 323 U.S. 338.

Thus, in the case at bar, the local draft board had a duty to re-open the matter when it received information that appellant had moved to Canada. There is an abundance of evidence in the record to the fact that petitioner was living in Canada.

The refusal to re-open petitioner's draft classification pursuant to 32 CFR 1622.42 (c) and to classify appellant IV-C upon his emigration to Canada was a denial of due process of law. *United States ex rel. Brown v. Resor,* 429 F.2d 1340 (10th CCA 1970); *United States v. Madden,* 314 F. Supp. 804 (D. N.H. 1970).

A refusal to even consider a post induction date claim is a denial of due process of law. *United States v. Shermeister,* 425 F.2d 1362 (7th CCA 1970); *United States v. Johnson,* 310 F. Supp. 624 (E.D. Wis. 1970). The denial of the appellant's local draft board to reclassify anew appellant upon his return to the United States as I-A was a denial of due process of law.

No classification is permanent. 32 CFR 1625.1 (a). There is a duty imposed by the Selective Service System's regulations upon the local draft board to keep registrant's files current and especially petitioner's file and to contain accurate information as petitioner's current status and address. 32 CFR 1625.1 (b).

A local draft board has the power to keep in touch with petitioner by utilizing the local police, the F.B.I. and other agencies who conduct investigations. 32 CFR 1625.1 (c).

CONCLUSION.

The refusal of petitioner's local draft board to re-open his case upon ascertaining that petitioner was an alien now residing in Canada, constitutes an abuse of discretion and a grave miscarriage of justice, rendering invalid a subsequent order to report for induction, and requiring a reversal of conviction for petitioner's refusal to submit for induction. *Mulloy v. United States, supra.*

There has been a denial of due process of law as guaranteed to petitioner by the Fifth Amendment to the Constitution of the United States by refusing to re-classify petitioner anew I-A upon his returning from Canada so that his trial was a mockery of justice so that this Court should exercise its power of review to correct an innocent person's conviction.

RELIEF ULTIMATELY SOUGHT.

Petitioner contends that there has been a denial of due process of law in the sentencing of petitioner which is so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and review.

Petitioner respectfully requests that after review of this matter the judgment of the United States District Court for the District of New Jersey therefore be reversed and final judgment rendered for appellant acquitting him of violating Title 50 U.S.C. Appendix, Section 462.

Respectfully submitted,

WALTER S. HAFFNER,
Counsel for Petitioner.

APPENDIX.

OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 19,249

UNITED STATES OF AMERICA,

vs.

ROMAN STANISLAW RYBA,
Appellant.

(D.C. Criminal No. 13-69)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued December 15, 1970
Before HASTIE, *Chief Judge*, and FREEDMAN* and GIBBONS, *Circuit Judges*

OPINION OF THE COURT.

(Filed April 23, 1971.)

HASTIE, *Chief Judge.*

The appellant, an alien and a selective service registrant, has been convicted of willful failure to report for induction into military service. His principal contention on this appeal is that he was improperly denied the right, given by statute to aliens other than those admitted for permanent residence, to elect whether he shall submit to

* Judge Freedman heard argument and participated in the consideration of this appeal but died before decision.

or be relieved of the obligation of service in the armed forces.[1]

Before 1951 this right was enjoyed by permanent resident aliens as well. Selective Service Act of 1948, ch. 625, § 4(a), 62 Stat. 605. But since that time a "male alien admitted for permanent residence," no different from a male citizen, has been fully liable for training and service in the armed forces. 50 U. S. C. App. § 454. The government contends that the appellant is an "alien admitted for permanent residence."

At the age of 14 the appellant, wtih his mother and sister, emigrated from his native Poland and entered the United States through regular immigration procedures. They joined his father, who had entered the country a year earlier, and took up residence as a family in Newark, New Jersey. There the appellant attended elementary school and high school. At the age of 18 he registered for selective service. As a then high school student he was classified 1-SH. After his graduation from high school and an unsuccessful effort to obtain a hardship deferment, he was classified 1-A, found physically qualified for induction and ordered to report for induction. He did not report. Subsequently he was arrested and charged with willful failure to report for induction.

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[1] Any male alien between the ages of 18 and 26, "who has remained in the United States in a status other than that of a permanent resident for a period exceeding one year (other than an alien exempted from registration under this title and regulations prescribed thereunder) shall be liable for training and service in the Armed Forces of the United States, except that any such alien shall be relieved from liability for training and service under this title if, prior to his induction into the Armed Forces he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States. . . ." 50 U. S. C. App. § 454(a).

After he had been indicted, the registrant for the first time informed his board that he sought relief as an alien entitled to elect whether he would be liable for military service.[2] The board declined to reopen his case, thus refusing to recognize him as such an alien as the law permits to avoid military training and service.

The present record indicates, without any evidence or basis for implication to the contrary, that the 14-year-old appellant was admitted to this country with his mother as an immigrant privileged to remain permanently. In an effort to avoid this conclusion it is argued that as an infant he had made no effective choice of status. But that is beside the point. The law determines and specifies immigrant status objectively upon the basis of the circumstances and conditions of entry. *Cf. U. S. v. Rumsa,* 7th Cir. 1954, 212 F.2d 927, *cert. denied,* 348 U.S. 838. Thus it is provided by statute that "[t]he term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20).[3]

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[2] Selective Service Regulation 1622.42(b) provides as follows:

"(b) In Class IV-C shall be placed any registrant who is an alien and who has not been admitted to the United States for permanent residence but who has remained in the United States for a period exceeding one year and who has, prior to his induction, made application to be relieved from liability for training and service in the Armed Forces of the United States by filing with the local board an Application by Alien for Relief from Training and Service in the Armed Forces (SSS Form 130), executed in duplicate. . . ."

[3] The House Report explaining the provision reads:

"Aliens who meet the qualitative tests and are eligible for admission into the United States are classified under existing law as either immigrants or nonimmigrants. The

(Continued on following page)

The registrant's selective service board had adequate basis for subjecting him to induction as an alien admitted for permanent residence, if only because at the time of registration he signed and filed with the board a questionnaire which specified that he was an alien admitted for permanent residence. And though it is contended that the clerk of the board assisted and guided him in filling out the questionnaire, nothing appears even now to indicate that the statement of his status at that time was incorrect.

Neither is there any evidence of a change of status. There is a prescribed statutory procedure by which certain aliens lawfully admitted for permanent residence can have their status "adjusted" by the Attorney General. 8 U.S.C. § 1257. But the registrant's situation is not covered by that statute. Moreover, assuming that his status could be changed by some action of an agency charged with the administration of the immigration laws, no request for such alteration of status has been made. Rather, after having been indicted for failure to report for induction, the registrant sought relief from his selective service board as if that agency had power to change his immigrant status. In these circumstances the board properly refused to grant relief.

No other issue of substance is presented by this appeal.

The judgment will be affirmed.

(*Continued from preceding page*)

immigrant class includes those aliens who seek to enter the United States for permanent residence, while the nonimmigrant class includes those aliens who seek to enter for temporary periods of stay. The present law, and the instant bill, provide that all applicants for admission who do not qualify as nonimmigrants are to be regarded as applicants for admission as immigrants." H. REP. No. 1365, 82nd CONG., 2d Sess., 1952 U.S. CODE CONG. & AD. NEWS 1689.

JUDGMENT OF THE COURT OF APPEALS.

(Filed April 23, 1971.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 19,249.

UNITED STATES OF AMERICA,

vs.

ROMAN STANISLAW RYBA,
Appellant.

Present: HASTIE, *Chief Judge* and FREEDMAN * and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 4, 1970, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk.

April 23, 1971.

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* Judge Freedman heard argument and participated in the consideration of this appeal, but died before decision.

ORDER OF COURT OF APPEALS DENYING REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 19,249.

UNITED STATES OF AMERICA,

vs.

ROMAN STANISLAW RYBA,
Appellant.

Present: HASTIE AND GIBBONS, *Circuit Judges.*

Upon consideration on motion by appellant for leave to file petition for rehearing out of time and Petition for Rehearing, both in the above-entitled case,

It is ORDERED that appellant's motion for leave to file petition for rehearing out of time be and hereby is granted; and

It is Further ORDERED that appellant's petition for rehearing be and hereby is denied.

By the Court,
/s/ WILLIAM H. HASTIE,
Circuit Judge.

Dated: June 25, 1971.

JUDGMENT AND COMMITMENT OF THE DISTRICT COURT.

(Filed March 4, 1970.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

No. Cr. 13-69.

UNITED STATES OF AMERICA,

vs.

ROMAN STANISLAW RYBA,

On this 27th day of February, 1970 came the attorney for the government and the defendant appeared in person and by counsel, Nicholas Albano, Jr. Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of wilful failure to appear and report for induction as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JAMES A. COOLAHAN,

United States District Judge.

INDICTMENT.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Title omitted.)

The Grand Jury in and for the District of New Jersey sitting at Newark charges:

That on or about the 18th day of September, 1968 at Newark in the State and District of New Jersey,

ROMAN STANISLAW RYBA

being a registrant with Selective Service Local Board No. 18 for New Jersey, and classified as I-A, and being required by law under a written Form dated August 29, 1968, transmitted to ROMAN STANISLAW RYBA to appear and report for induction into military training and service in the Armed Forces of the United States on September 18, 1968 at Local Board No. 18, Federal Building, 970 Broad Street, Newark, New Jersey, did knowingly, wilfully and unlawfully fail to appear and report for such induction into military training and service in the Armed Forces of the United States at the time and place specified above.

In violation of Title 50 U.S.C. Appendix, Section 462.

A TRUE BILL

Foreman

/s/ DAVID M. SATZ, JR.,
United States Attorney.

EXHIBIT D-1 A.

DEPARTMENT OF MANPOWER AND IMMIGRATION

CANADA

680 Fifth Avenue
New York, N.Y. 10019
December 29, 1967

Mr. R. Roman Ryba
70 Cedar Street
Cedar Grove, New York 07009

Dear Mr. Ryba:

This is to acknowledge your recent inquiry concerning admission to Canada.

In order that I may advise you in more detail it is essential that I have more information regarding yourself and your plans.

I would appreciate it if you would complete the enclosed and return it to me at your earliest convenience. It will be carefully studied and you will be advised further.

Very truly yours,
H. W. THOMSON,
Immigration Officer-in-Charge.

EXHIBIT D-4.

DEPARTMENT OF MANPOWER AND IMMIGRATION

CANADA

500 Queen Street,
Niagara Falls, Ontario,
17 January, 1968

Mr. Roman Stanislaw Ryba,
70 Cedar Street,
Cedar Grove, New Jersey,
U. S. A. 07009

Dear Mr. Ryba:

This will acknowledge receipt of Form Imm. O. S. 8 representing your application for admission to Canada.

Some additional enquiries are beig initiated concurrently and immediately these are completed, you will be informed of the further procedure to be followed.

Yours truly,
W. C. FISCHER,
Office in Charge,
Canada Immigration Division.

EXHIBIT D-2.

DEPARTMENT OF MANPOWER AND IMMIGRATION

CANADA

(Canada Immigration, Sep. 2, 1968, Niagara Falls)

The Manager,
Canada Manpower Centre,

Dear Sirs:

We have received an application for permanent admission to Canada from Mr. Roman Stanislaw RYBA.

There is no objection on our part to the above named accepting employment, pending compliance with Immigration requirements.

Yours very truly,
C. O. RICHARDS,
for Office-in-Charge,
Immigration Division.